

American Oil Company, Inc.
5585 Georgetown Road
Indianapolis, Indiana 46254

Permit No. DL49-18873

District 6

American Oil Company, Inc.
6050 West 71st Street
Indianapolis, Indiana 46278

Permit No. DL49-18879

District 6

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND OF THE CASE

The Permittee, American Oil Company, Inc., 5585 Georgetown Road, Indianapolis, Indiana 46254 (Permittee) is the applicant for a type 116 Alcohol and Tobacco Commission (ATC) permit, #DL49-18873.¹ On or about November 15, 2000, permittee filed its application for a new permit which was assigned to the Marion County Local Alcoholic Beverage Board (LB) for hearing.² The LB heard the request on April 15, 2002 and on that same date, voted 2 – 2 with respect to the application.³ The ATC considered the matter on July 16, 2002 and granted the application for the permit.

The Permittee, American Oil Company, Inc., 6070 West 71st Street, Indianapolis, Indiana 46278 (Permittee) is the applicant for a type 116 Alcohol and Tobacco Commission (ATC) permit, #DL49-18879. On or about November 15, 2000, permittee filed its application for a new permit which was assigned to the Marion County Local Alcoholic Beverage Board (LB) for hearing. The LB heard the request on April 15, 2002 and on that same date, voted 2 – 1 with respect to the application.⁴ The ATC considered the matter on July 16, 2002 and granted the application for the permit.

The remonstrators filed a timely notice of appeal with respect to each case and both matters were assigned to the ATC Hearing Judge, Mark C. Webb (HJ).⁵ The HJ set

¹ Beer and wine (grocery) permit located in an unincorporated area. These stores operate as BP Amoco

² The LB initially heard these matters on February 20, 2001, and voted 3 – 1 to deny the application for the reason that the permittee had failed to prove itself as a grocery store. *See*, IC 7.1-3-5-2(a). The Commission subsequently adopted this recommendation on March 6, 2001 and denied the permit.

³ This vote does not constitute a recommendation of the LB. *See*, IC 7.1-2-4-16; IC 7.1-3-19-11. However, irrespective of such a vote, the ATC is authorized to act on the application. *See*, IC 7.1-3-19-1; IC 7.1-3-19-10; *Indiana Alcoholic Beverage Commission v. State ex.rel. Harmon*, (1978), Ind., 379 N.E.2d 140, 142, 146-147

⁴ LB President Robert Spear was present and voted to deny the application but did not sign the voting sheet. Thus, the actual vote was 2 – 2, identical to No. DL49-18873.

⁵ Following an initial timely appeal by the permittees from the March 6, 2001 denial, the Commission remanded the matters back to the LB, which, following a series of continuances were heard again on April 15, 2002.

the matters for hearing on September 16, 2003, and at that time, the application for Permit No. DL49-18873 was withdrawn because of the permittee's inability to satisfy certain zoning regulations.⁶ With respect to Permit No. DL49-18879, witnesses were sworn, evidence was heard and the matter was taken under advisement. The permittee was represented by Jeffrey L. McKean. Remonstrator Indiana Association of Beverage Retailers (IABR), was represented by Thomas W. Blessing.⁷ Remonstrator Marion County Alliance of Neighborhood Associations (MCANA) was not represented by counsel but was present through Mary Walker. Remonstrator Pike Township Residents' Association (PTRA) was not represented by counsel but was present through Jeanette Robertson. The HJ took judicial and administrative notice of the entire contents of the file in this matter and now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

A. FEBRUARY 21, 2001 HEARING⁸

1. The following individuals testified before the LB in favor of the permittee in this cause:
 - a. Greg Sackin (sp), from BP Amoco Corporation. He testified that BP Amoco has operated convenience stores for several decades in approximately 40 states. They currently have several stores in Indiana which sell beer and wine. He added that rising fuel costs in recent years have squeezed that particular margin and the company expects that 50% of its profitability will come from the store operations which is a reason the company is switching to bigger stores. Currently store profit is around 10-20% of the entire operation on average.⁹ The floor space of the 51 linear feet of grocery shelving takes up approximately 150 square feet.¹⁰

⁶ IC 7.1-3-1-5.5(j) requires applicants for new permits in Marion County to satisfy all zoning requirements before they are cleared to operate. The nature of the applicant's failure(s) in this regard were not disclosed.

⁷ The IABR is a trade association representing the interests of the Indiana package liquor store industry. The organization withdrew its appeal in writing on December 4, 2003, which motion was previously granted. Thus only MCANA and PTRA remain in this matter.

⁸ Because the instant appeal is from a remand by the Commission, and because the LB incorporated the evidence from the February 21, 2001 hearing into the record on April 15, 2003, evidence submitted at the earlier hearing is noted and considered by this HJ. This HJ would note that the permittee was represented at this hearing by attorney James Bradford. None of the remonstrators were represented by counsel at this stage of the proceedings.

⁹ The BP Amoco at 8045 South Meridian Street had approximately 27% of its income from the store operations. Of that total, approximately 1/5 is from non-taxable grocery items. For purposes of the February 21, 2001 LB hearing, the LB seemed to accept the ultimate bottom line that 5.4% of the South Meridian Street's total sales were in grocery items and this HJ will accept this figure with respect to that store for purposes of this appeal.

¹⁰ When one takes into account the restaurant portion of the building, the cooler space (included within the 4200 square feet) and the amount of space necessary for floor traffic, it is apparent to this HJ that

- b. Jason Doyle, affiliated with BP Amoco.¹¹ These stores are all identical in layout to each other and to the proposed permit premises at issue and employ around 25 persons each. Each store has approximately 51 linear feet of grocery items throughout the store. The layout of these new BP Connect concept stores is part of a pilot program for one-stop shopping being launched in Indianapolis and 2 other world markets.¹²
 - c. James Bradford, Bradford & Riley. Mr. Bradford has been associated with the purchase and sale of alcohol permits throughout Indiana for the past several years. He feels that the stores at issue here are among the largest and finest convenience/grocery stores located anywhere in Indiana. He was involved in the awarding of the permit for the Marathon station at 56th Street and Georgetown Road, and he pointed out that there were no remonstrators for that one. He also noted that he helped the Saddlebrook Golf Course get a permit approximately 10 years ago. He noted that traditional grocery stores are changing and that many of them have large concentrations of items which would not have been common in those same stores just a few years ago. He criticized the remonstrators in general for having no set criteria for locations they choose to remonstrate against and those they do not.
2. The following exhibits were introduced before the LB in favor of the permittee in this cause:
- a. Photographs (19) of the BP Amoco gas station/convenience store located at 8045 South Meridian Street, showing indoor and outdoor aspects of the premises.¹³
 - b. Site floorplan and shelf layout (9 pages) for the proposed permit premises.¹⁴
 - c. Listing of inventory (approximately 130 pages).¹⁵

approximately 1/3 of the inside of the building is used in connection with the use, sale or consumption of grocery items.

¹¹ The February 21, 2001 transcript does not reveal Jason's last name, he did not identify himself before speaking and the LB failed to request that he do so. However, one Jason Doyle testified on behalf of the permittees at the April 15, 2003 remand LB hearing and this HJ believes that after listening to the tapes of both hearings that they are one and the same. Nonetheless, LBs are again reminded to require all individuals to identify themselves before speaking, which greatly helps facilitate administrative and judicial review.

¹² The other markets BP that is rolling these new format stores out are Cleveland and London.

¹³ 8045 South Meridian Street is identical to the permit premises under consideration in this matter. These photos are introduced for illustrative purposes only because the instant locations were not complete as of the February 21, 2001 LB hearing.

¹⁴ Each shelving unit, known as a gondola, is separately illustrated, although its respective contents are not described on the illustration.

¹⁵ The permit premises stocks items normally found in a grocery setting, including automotive items (motor oil, antifreeze, gas and engine treatments, fuses, etc.), toilet paper, Kleenex, pet food and supplies, household cleaners, laundry detergent, dishwasher detergent, trash bags, soups, breakfast cereals and bars, coffee and supplies, canned meats, vegetables and fruits, pasta and sauce, peanut butter, jelly, macaroni and cheese dinners, mash potatoes, sugar, flour, pancake mix and syrup, salad dressing and condiments, insect repellents, charcoal and lighter fluid, potato chips pretzels, snack cakes, crackers, candy and other snack foods, cookies, beef jerky, cold medicines, first aid ointments, aspirin, shampoo and hair care products, oral hygiene products, diapers, feminine hygiene products, batteries, pencils, playing cards, glue, envelopes,

3. The following individuals testified before the LB in favor of the remonstrators and against the permittee in this cause:
 - a. Ray Cox, package liquor store holder in Marion County.¹⁶ Mr. Cox opposed both applications on the basis that the permittees were not grocery stores within the meaning of either Indiana law or a particular federal census definition.¹⁷ He also argued that there was not need or desire for the services at that location.
 - b. Jeanette Robertson, Pike Township Residence Association. She testified that with respect to 56th and Georgetown, there were already several liquor outlets including Marsh Supermarket, CVS Drug Store, Osco Drug Store, Marathon gas station, Kelly's Pub, Out of Bounds, and Los Pelicanos. Immediately north of 56th Street in the vicinity is a residential development known as Brookfield Village, consisting of single family homes. Further east is the Dying Creek Wood Condominium Association. Just slightly west of that is the Rosewood Commons Apartments.¹⁸ With respect to the location on West 71st Street, it is at the intersection of 71st Street just east of Interstate 465 on the west side of Indianapolis. There is a restaurant called Gallahad's in the vicinity as well as another restaurant location in InTech Park, just west of I-465. Approximately one mile away is a Kroger store with a pharmacy permit and a package liquor store. Immediately north of the proposed site here is the Learning Universe Child Development Center, the director of which is

bread, donuts, ice cream, milk, cheese and other dairy products, juice, lunchmeats, soft drinks, and bottled water.

¹⁶ Mr. Cox, as the owner of a package liquor store, is a would-be competitor of BP Amoco and, according to *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. App. 1990), *trans. denied*, has no standing before this Commission. *But see, also, Indiana Association of Beverage Retailers, et.al., v. Indiana Alcohol & Tobacco Commission, et.al.*, No. 49A02-0307-CV-634 (May 25, 2004), stating that a competing permittee has standing before the Commission to contest the awarding of a permit to a competitor. Even if he were to be accorded standing, he clearly has a bias in favor of minimizing competition to the package liquor store industry. *See, Standifer v. State*, (1999), Ind., 718 N.E.2d 1107, 1110 "A witness's bias, prejudice or ulterior motives are always relevant in that they may discredit him or affect the weight of [the] testimony" (quoting *Pfefferkorn v. State*, (1980), Ind.App., 413 N.E.2d 1088, 1089. Thus his testimony would not be considered compelling given his economic motivation for opposing this permit. Competition between permittees is not a valid reason for denying a permit. Furthermore, Mr. Cox appeared on behalf of the IABR and argued as to whether the permittees were grocery stores in accordance with Indiana law. Such arguments are clearly the practice of law and cannot be performed on behalf of others by non-lawyers. *See, State ex rel. Indiana State Bar Association v. Miller*, (2002), Ind., 770 N.E.2d 328 (prohibiting non-attorneys from representing others before state agencies in matters constituting the practice of law).

¹⁷ Mr. Cox apparently offered into evidence a document purporting to show that the federal government had defined supermarkets and grocery stores, and had separately defined convenience stores and gas stations with convenience stores. This HJ is unaware of such a classification, and in any event, for reasons unknown, this document is not within the record of proceedings received from the LB and thus will not be considered in this review.

¹⁸ Remonstrators make no argument that the permits sought are being placed in residential areas within the meaning of IC 7.1-1-3-38, and this HJ, being familiar with both locations, takes judicial notice for purposes of this appeal that they are not.

opposed to the granting of this permit.¹⁹ Just north of the child care center is a church located in Park 100 business center.²⁰ At the intersection of 71st Street and Zionsville Road, approximately 3/10 of a mile east of the proposed permit premises, is a complex of the Metropolitan School District of Pike Township containing a high school, middle school and an elementary school. Just southeast of the proposed permit premises is a residential neighborhood which has been there for several years.²¹ Ms. Robertson also stated some “real issues” with the proximity of the proposed permit premises to I-465, but did not go into further detail regarding them. She concluded her testimony by saying that the request for sale of beer and wine was not wanted within Pike Township and in all likelihood, the entire county.²²

- c. Alan Kasper, Director of Security and Chief of Police for Pike Township Schools. Mr. Kasper noted that the school has had several problems with having its students obtain liquor illegally from a package liquor store at 71st and Georgetown Road²³ as well as some of the convenience stores. He also stated that the 56th Street and Georgetown location was approximately ½ mile from an existing middle school, which was not specifically named. With respect to those students caught with alcohol, some of the matters were dealt with internally, and others were turned over to the prosecutor’s office for criminal prosecution.²⁴
- d. Jim Adobo, a resident of Saddlebrook Homeowners Association South, approximately ¼ mile east of 56th Street and Georgetown Road. He too, commented that there were at least 11 locations in the near vicinity in which to purchase alcoholic beverages and that no more were needed. He indicated that an additional problem which he attributed to the liquor outlets in general, was the trash problem. The neighborhood association pays \$37 per week for their landscape contractor to pick up trash throughout the neighborhood, primarily because of the number of wine and liquor outlets. He noted that most of what they collect is actually wine and liquor bottles and cans. He also stated that within the past five years, they have had a couple of serious automobile property damage incidents where alcohol was involved.
- e. Mary Walker, representing Marion County Alliance of Neighborhood Associations (MCANA). She began by offering into the record a letter written from MCANA to the LB which opposed the granting of permits to

¹⁹ According to a photographic exhibit introduced by the remonstrators, the child development center appears to be separated by at least one full business lot and several hundred feet. The director was not present for the LB hearing, and in any event, no evidence was introduced to show that there would be a material change in the business environment in the area if the permit request for DL49-18879 were granted.

²⁰ There is no indication that this church is within 200 feet of the permit premises, and this HJ assumes for purposes of this appeal that IC 7.1-3-21-11(b) is not implicated.

²¹ A Base Map 9A and 9B Zoning map submitted by the remonstrators shows that the northwest corner of the neighborhood appears to be diagonally across the street from the southeast corner of the permit premises lot.

²² Ms. Robertson also offered some documents into evidence, which this HJ has been unable to locate, and which were received by the LB, but for reasons unknown, not included within the record of proceedings.

²³ This location is approximately one mile east of the proposed permit location, or about ½ mile east of the school complex.

²⁴ Mr. Kasper provided no further documentation in this regard and this information cannot be verified.

convenience stores which sell gasoline.²⁵ She further objected that the permittee is not a grocery store and thus not entitled to a permit.²⁶ She also acknowledged that MCANA does not confine its remonstrances to convenience stores and had also remonstrated recently against several package liquor stores.

- f. Norman Pace, land use chairman for MCANA. He testified that MCANA feels very important about educating teens against drinking and driving.²⁷
4. The following exhibits were introduced before the LB in favor of the remonstrators and against the permittee in this cause:²⁸
 - a. Base Map 9A and 9B Zoning pertaining to the 6050 West 71st Street, Permit No. DL49-18879
 - b. Enlarged copy of Base Map 9B Zoning showing the area surrounding the proposed permit premises.
 - c. Photographs showing the location of the Learning Universe Child Development Center relative to the proposed permit premises.
 - d. Articles of Incorporation for American Oil Company, filed April 12, 1957.²⁹

B. APRIL 15, 2003 LB HEARING³⁰

1. The following individuals testified in favor of the permittee before the LB at the April 15, 2003 hearing:
 - a. Jason Doyle, BP Amoco, field supervisor North America, having responsibility for *inter alia*, permits located in Indiana and Marion County. Currently, there are 14 grocery dealer permits under his supervision located in Marion, Hamilton, Hendricks and Johnson counties. With respect to the two locations at issue, they sell typical grocery items, including bacon, bakery

²⁵ This HJ notes that this objection is categorically based and not specific to any particular location.

²⁶ As with Mr. Cox, this argument constitutes the practice of law and, while permissible for Ms. Walker on her own behalf, is improper for her on behalf of MCANA. *See*, fn. 16, *supra*.

²⁷ This is a common-sense argument to which there should be no disagreement. However, this HJ fails to see the distinction between purchasing beer in a grocery store such as Kroger or Meijer having driven there by car and purchasing beer at a BP or similar store.

²⁸ For reasons unknown to this HJ, only a portion of the remonstrators' exhibits pertaining to Permit No. DL49-18879, 6050 West 71st Street, are included in the record of proceedings pertaining the February 21, 2001 LB hearing received from the LB. No exhibits pertaining to DL49-18873, 5585 Georgetown Road from this hearing are included.

²⁹ American Oil Company is a precursor corporation to BP-Amoco. Remonstrator Mary Walker introduced this document in support of her argument that the purpose of the American Oil Company is involvement primarily in the petroleum industry and does not list as one of its primary purposes that of a grocery store. Given the changing business environment from 1957 until the present, this HJ does not place much reliance on this document in determining whether the instant permit premises may qualify as grocery stores.

³⁰ This HJ would note that for the April 15, 2003 remand hearing, the permittee was represented by Jeffrey L. McKean and remonstrator IABR was represented by Thomas W. Blessing.

products, dairy products, milk, eggs, cheese, cereals, canned goods, frozen foods, bread, health and beauty aids, toiletries, juices, drinks, pet foods, butter, paper products, meats, donuts, chips, sandwiches and candy. With respect sales and inventory figures for each store in 2001, he testified that the store at 71st and Woodlawn made a profit of \$304,169 on sales of gasoline and \$490,507 on the sale of grocery items, and that the store at 56th and Georgetown made a profit of \$383,322 on sales of gasoline and \$336,450 on the sale of grocery items.³¹ The store at 71st and Woodlawn had net profit attributable to sale of grocery items (as opposed to gasoline) of 61.72% and that the store at 56th and Georgetown had the same type of profit at 46.74%. 71st and Woodlawn had an average percentage of inventory of grocery items of 91.12% and 56th and Georgetown for the same category had 84.58%. The average inventory of gasoline in the ground storage tanks available for sale at any given time for 71st and Woodlawn was \$8963, and for 56th and Georgetown, \$12,700.³² With respect to gross sales, 71st and Woodlawn did \$1,672,747 in sales of gasoline, less taxes and \$1,058,793 in grocery items, less taxes. 56th and Georgetown did \$2,218,867 in sales of gasoline, less taxes and \$1,039,160 in grocery items, less taxes. The percentage of gross sales of grocery items less taxes at 71st and Woodlawn was 38.62% and for 56th and Georgetown, 31.9%. The average daily number of non-fuel customers at 71st and Woodlawn, including the café/restaurant is 2176 and the same number for 56th and Georgetown is 1563.³³ With respect to security and training, the permit premises will be monitored by cameras 24/7. All employees are carefully instructed on the sale of alcohol to ensure no sales to minors. With respect to its other locations with alcohol permits, Mr. Doyle testified that no store had experienced loitering problems nor any gang incident or other accident issues. He further stated that if these stores were granted alcohol permits, that any problems which occurred and were related to the permits would be dealt with promptly. Both stores also contain limited wireless internet access to accommodate customer requests which it provides free of charge.

2. The following exhibits were offered into evidence in favor of the permittee at the April 15, 2003 LB hearing:

³¹ Of the grocery figures, with respect to 71st and Woodlawn, approximately \$150,000 is attributable to sales from the Wild Bean Café. Permittee's counsel also noted in his argument that due to the fluxuating and highly volatile price of gasoline as well as competition within the gasoline industry, that the convenience store operators were having to increasingly rely on sales of items inside the store for profit as opposed to profit on the sale of gasoline.

³² It appears from Mr. Doyle's responses to LB questions that the inventory figures for gasoline were based on permittee's actual cost, while the inventory figures for grocery items were based on retail cost. This seems to confuse the results somewhat and this HJ is unaware of the reason for the distinction. Mr. Doyle further testified that with respect to the \$92,007 average grocery inventory, if it were based on actual cost, it would be around \$62,000. Thus the percentage of grocery inventory would be closer to 87%.

³³ With respect to the average daily number of non-fuel customers, it is unclear to this HJ as to how these numbers were generated. It does not show what they are buying, but only that they are not buying gas.

- a. Copy of Findings of Fact and Conclusion of Law in the matter of the application for a permit for American Oil Company, 2132 U.S. Highway 31, Greenwood, Indiana 46143, Permit No. DL41-18884, dated January 23, 2002.³⁴
- b. Copy of Findings of Fact and Conclusions of Law in the matter of the application for a permit for Thornton Oil Company, 1600 U.S. Highway 31 South, Greenwood, Indiana 46143, Permit No. DL41-18911, dated January 23, 2002.³⁵
- c. Findings of Fact and Conclusions of Law in the matter of *Kokolene Oil Corporation v. Indiana Alcoholic Beverage Commission, et al.*, Hendricks County Circuit Court, Cause No. CV781-322, filed May 25, 1984.³⁶
- d. Findings of Fact and Conclusions of Law and Judgment in the matter of *The Pantry, Inc., v. Indiana Alcoholic Beverage Commission, et al.*, Gibson County Circuit Court, Cause No. 26C018901 CP0005, filed February 22, 1990.³⁷
- e. Letter of March 1, 1991 from newly installed Executive Secretary Daniel M. Steiner to all of the local boards throughout Indiana regarding aspects of local board hearings.³⁸
- f. Listing of all Type 115 grocery permits awarded by the Commission as of January 31, 2002.³⁹
- g. Listing of convenience stores holding grocery store permits in Indiana.⁴⁰
- h. Breakdown of profit/sales figures for both proposed permit premises for 2001.⁴¹

³⁴ This shows that a similar permit request for an identical store was earlier granted by the Commission, thus bolstering permittee's argument that the Commission has already determined an identical premises to qualify for a grocery permit.

³⁵ Although this is a different company, this HJ would note that essentially, that store and the BP Amocos seeking permits carry essentially the same or similar items.

³⁶ This judgment is from a trial court on judicial review reversing the Commission's denial of a permit for a Kokolene gas station/convenience store. Here it is worthy to note that the trial court did not focus on any one particular factor, such as gross or net profit or inventory, but rather, utilized a "totality of the circumstances" to determine whether the permit premises at issue constituted a grocery store. It noted that grocery stores sell items other than food, including gasoline.

³⁷ This judgment is from a trial court on judicial review reversing the Commission's denial of a permit for a gas station/convenience store. Here, the trial court noted that Indiana law does not permit a local board to recommend the denial of a permit for a grocery store solely on the basis that it also sells gasoline.

³⁸ Mr. Steiner instructed all local boards that it was improper to base a denial of a grocery permit on the basis that the applicant also sold gasoline at the same site, and noting that any such prohibition must come from the General Assembly.

³⁹ Although this list shows some 500 convenience/grocery permits, it is unclear as to how many of them were renewals from prior to 1997 when the law in this area changed. Therefore this HJ finds its value to be marginal without a designation on the exhibit itself as to which permits were in existence prior to 1997.

⁴⁰ *Id.* This HJ does not know when this list was compiled and it suffers from the same deficiency as the previous exhibit due to the lack of breakdown between pre and post-1997 permits.

⁴¹ According to this exhibit, 71st and Woodlawn had approximately 38.62% of total sales to be in grocery items as opposed to gasoline, and that 56th and Georgetown had approximately 31.9% for the same sales figure. However, Mr. Doyle took the position that everything other than gasoline was a grocery item, including motor oil, windshield washer fluid, etc., because those items are commonly found in grocery stores. However, this HJ feels that this distinction is not well taken, in part, because a grocery store is not a first-choice destination for one who desires to purchase only those items. Thus, this HJ concludes that the

- i. Petition listing approximately 109 individuals in support of the permits sought in this matter.⁴²
 - j. Petition listing approximately 135 individuals in support of the permit sought for 71st and Woodlawn in this matter.⁴³
 - k. Menu listing for Wild Bean Café at each of the two locations in this matter.
 - l. Advertisement showing special on sandwiches for Thursday, March 21, 2002 [sic].
 - m. Copy of coupon offering free 20 oz. coffee with purchase of any bakery item, good through 6-30-02.
 - n. Training materials, including mandatory training for individuals hired at stores with alcohol sales permits.
3. The following individuals testified in favor of the remonstrators and against the permittee before the LB at the April 15, 2003 hearing:
- a. Ray Cox, package liquor store owner in Marion County.⁴⁴ Mr. Cox admitted that his package liquor store was not located in the vicinity of either of the two permits at issue here. He contends that the applicants at issue here are not grocery stores, but merely gas stations that sell a few grocery items. He stated that they were not listed in the Yellow Pages as grocery stores, but Amoco stations were listed as gas/service stations instead. He also pulled the Improvement Location Permits for each of the sites and found that the use as stated by the applicants was as a gas station/convenience store rather than a grocery store. He further showed photographs of highway information signs showing that the stations were advertised to highway motorists as “gas” stations.⁴⁵ He stated that he was not opposed to the idea of competition from grocery stores in general, but that he was opposed to the idea of unfair competition from stores that did not qualify for permits under the 1997 legislative changes allowing package liquor stores, drug stores and grocery stores to sell alcohol.⁴⁶ Mr. Cox admitted that with respect to the location of

total percentage attributable to actual grocery items is less than what BP represented in its Exhibit H., but does not believe it to be less than the 5.4% total sales attributed to the store at 8045 South Meridian Street in February, 2001, and, most likely, greater than that figure. *See*, fns. 9, 13, *supra*.

⁴² Although this exhibit shows some evidence of need and desire, its relevance is somewhat hampered by the fact that many of the individuals listed have no addresses so it is impossible to determine how close they live to the proposed permit premises and thus how they might be impacted, and by the fact that many of the signatures are illegible so it would be difficult to identify and locate these persons for verification, if necessary.

⁴³ *Id.*

⁴⁴ Mr. Cox appeared for himself as well as in his capacity as a board member of the IABR. This HJ’s comments on standing and motives for testifying are equally applicable here. *See*, fn. 16, *supra*.

⁴⁵ This HJ is familiar with highway information signs which inform motorists which services are available at upcoming exits. The fact that these stations are advertised as “gas” stations is irrelevant to the consideration of whether they qualify as grocery stores for purposes of obtaining an alcoholic beverage permit. These signs are placed by the Indiana Department of Transportation and not by the individual businesses. Moreover, this HJ is unaware of any category which alerts motorists to neighboring grocery stores at upcoming exits.

⁴⁶ P.L. 74-1997, Sec. 1. This HJ is somewhat skeptical of this claim, given the IABR’s past involvement in opposing pharmacy permits for drug stores and grocery permits for large grocery stores such as Meijer,

his own package liquor store on the east side of Indianapolis, that there were three gas station/ convenience/grocery stores located at that intersection, two of which had grocery permits. It was not possible to tell from the outside which ones sold alcohol and which one did not. He was also unaware of any increase in alcohol related crimes at that location which could be attributed to the presence of the grocery permits. He also felt that package liquor stores were more effective at keeping minors from purchasing alcohol by carding them immediately upon entering. He later indicated that the IABR was at a disadvantage against the large number of gasoline/ convenience stores seeking alcohol permits with respect to having to hire attorneys to represent itself in these proceedings.

- b. Jeanette Robertson, Pike Township Residents' Association. She summarized her 2001 testimony and stated that the PTAA voted unanimously in 2001 to oppose the locations of these permits and that position remains accurate today. She also stated that there were numerous other locations where alcohol was available in the area. The PTAA remains opposed to any convenience store outlets anywhere in Pike Township as well as Marion County. On cross-examination, Ms. Robertson stated that in addition to the problem of keeping alcohol out of the hands of minors, her group was also saying that "enough is enough", that there are already sufficient alcohol outlets in the area and that more are not needed. She admitted that she had no evidence to suggest that these two additional permittees would actually contribute to the problems of minors obtaining alcohol, or that BP in general contributed to this problem. She does not think of these stores as grocery stores in the conventional sense of the word.
- c. Jim Adobo, a board member of Saddlebrook Homeowners' Association. The Saddlebrook Homeowners' Association has opposed this petition from the beginning. The association represents 346 homes and has determined that the further sale of alcohol in the area is unwanted and unnecessary. When BP Amoco appealed from the February 21, 2001 hearing, the association arranged for a cross-section polling of the community and determined that the area did not want any more alcohol sales in it.⁴⁷ Mr. Adobo admitted on cross examination that he had no evidence of BP Amoco being a problem with regard to sale of alcohol to minors.⁴⁸

Walmart, Kroger, etc. Moreover, from 1997 until 2002, package liquor stores were ineligible to obtain beer permits under what this HJ feels were inadvertent omissions in the 1997 changes, but the law nonetheless until 2002. Notwithstanding their claim that dealer permits be only granted in accordance with Indiana law, this HJ is unaware that any package liquor store permit holder or the IABR remonstrated at any new package liquor store which opened between 1997 and 2002 and which asked for a beer dealer permit. In short, the IABR seems to favor strict interpretation of the law only when it suits their purposes in a given case.

⁴⁷ This apparently took place at a subsequent town meeting and around 80% of the individuals present signed a petition in opposition to these permits. However, for reasons unknown, this petition was apparently not offered into evidence and is thus not contained in the record of proceedings received from the LB.

⁴⁸ Mr. Adobo also alluded to the LB of the testimony from Alan Kasper, chief of Pike Township School Police, by saying that Mr. Kasper indicated that the convenience stores were the source of alcohol obtained illegally by students. This HJ sees this as a distortion of Mr. Kasper's testimony, who actually indicated in

- d. Mary Walker, Marion County Alliance of Neighborhood Associations (MCANA). She continued to press her case that the permittee, through its corporate papers, describes itself as engaged in the oil business, not the grocery business. She contended that 5.4% of the sales from the business being in non-taxable grocery items is not substantial within the meaning of the character of business test.⁴⁹ She objected to any insinuation from the permittee that it needed these permits to be profitable or to otherwise compete with its competition, stating that the president of BP Amoco stated on a recent radio program that the company in 2001 made \$14 billion in profits.
 - e. Randy Bynum, package liquor store owner in Marion County.⁵⁰ He questioned the reasoning behind the distinction between gross or net profits.
 - f. John Livengood, president of Indiana Association of Beverage Retailers.⁵¹ He pointed out that the IABR has limited resources and makes judgments as to which matters it will remonstrate and which it will not. However, he did state that he wished that the ATC would adopt a definition of a grocery store so that the entire industry would have a bright-line rule from which to operate.
4. The following exhibits were introduced in favor of the remonstrators and against the permittee before the LB at the April 15, 2003 hearing:
 - a. With respect to 6050 West 71st Street, #DL49-18879, remonstrator IABR introduced the following documents:
 1. Copies of pages 1204-1205; 406; 639-640 of 2001 Ameritech Yellow Pages listings pertaining to service stations, convenience stores and grocery stores, respectively.⁵²
 2. Improvement Location Permit issued by the City of Indianapolis 10-11-2000 for the location at 6050 West 71st Street.⁵³

February, 2001, that there was a package liquor store at 71st Street and Georgetown Road as one of the primary problem locations.

⁴⁹ IC 7.1-3-1-19. MCANA seems to be under the incorrect assumption that the “character of business” test must be the main function of the permit premises. From the Commission’s perspective, a grocery dealer permittee need not have total sales of 50% or more in grocery items to constitute a grocery store.

“Substantial” means more than nominal but certainly less than 50%.

⁵⁰ Mr. Bynum’s testimony suffers from the same infirmity as Mr. Cox’s. *See*, fn. 16, *supra*.

⁵¹ Mr. Livengood’s testimony suffers from the same infirmity as Mr. Cox’s. *See*, fn. 16, *supra*.

⁵² Although these particular BP Amocos are not individually listed with the service stations, other BP Amocos are listed as service/gas stations. They are not listed with the convenience stores and are not listed with any grocery stores. Notwithstanding the above, this HJ does not find this argument compelling given the brief time for which these stores have been operating, the voluntary nature of Yellow Pages listings and that the Yellow Pages listing of any business is not necessarily dispositive of its nature. In other words, the fact that these stores are not listed as grocery stores has nothing to do with whether they carry grocery items. Moreover, Mr. Doyle testified that the reasoning behind the listing was more to aid in the ability to locate a telephone number for the business as opposed to an additional outlet for advertising.

⁵³ Remonstrator IABR takes issue with the ILP which indicates that proposed improvement is a new gas station as opposed to a grocery store. This HJ would note that this ILP does not in any way confine the permittee solely to the operation of a gas station, nor does it forbid the permittee from attempting to qualify as a grocery store in accordance with Indiana law.

3. Photographs (6) showing (1) the highway exit sign and (2) directions to a “gas” station, (3) a photograph of interior grocery items, (4) photograph of gas pumps, (5) photograph of the station from across the street and (6) photograph of the station from another angle.
- b. With respect to 5585 Georgetown Road, #DL49-18873, remonstrator IABR introduced the following documents:
 1. Copies of pages 1204-1205; 406; 639-640 of 2001 Ameritech Yellow Pages listings pertaining to service stations, convenience stores and grocery stores, respectively.⁵⁴
 2. Improvement Location Permit issued by the City of Indianapolis 10-11-2000 for the location at 6050 West 71st Street.⁵⁵
 - c. With respect to both proposed permit premises, remonstrator PTR A introduced the following documents:
 1. Petition with 289 names and addresses of persons who reside in Pike Township, Marion County, which oppose the issuance of these permits.
 - d. With respect to both proposed permit premises, remonstrator MCANA introduced the following documents:
 1. Original of page C8, Indianapolis Star, Wednesday, March 20, 2002, consisting of a full page advertisement for BP Connect’s Wild Bean Café, stating that the café offers deli sandwiches, salads, fresh baked cookies and more items.⁵⁶

III. EVIDENCE BEFORE THE ATC⁵⁷

- A. The following individuals testified before the ATC in favor of the permittee in this cause:
 1. Rhonda Hartman, District Manager for BP Amoco. She has been with the company 17 months and is responsible for the store at 71st and Woodlawn.

⁵⁴ Again, this exhibit is not compelling evidence that the proposed permit premises does not qualify as a grocery store. *See*, fn. 52, *supra*.

⁵⁵ *Id.*, *see* fn. 53, *supra*.

⁵⁶ MCANA offers this exhibit to show that there is a lack of promotion for the facility as a grocery store. However, from this HJ’s perspective, nothing offered for sale in the advertisement is inconsistent with items found in a grocery store.

⁵⁷ Permit No. DL49-19973, 56th and Georgetown was withdrawn prior to the presentation of evidence before the Commission. Therefore, the hearing was conducted only with respect to Permit No. DL49-18879, 71st and Woodlawn.

The store has been selling beer and wine since August, 2002, when the permit was first granted. She checks on her stores an average of twice per month. There have been no complaints regarding loitering, minor sales, criminal activity, drugs or any other problems or accidents at that location since the sale of alcohol began. There have been no complaints from neighbors or customers regarding sales of alcohol. The location at issue needs the permit to compete with the competition, which from its perspective, is approximately two mile radius from the store.

B. The following exhibits were introduced before the ATC in favor of the permittee in this cause:

1. None.⁵⁸

C. The following individuals testified before the ATC in favor of the remonstrators and against the permittee in this cause:

1. Jeanette Robertson, Pike Township Residents' Association. Ms. Robertson noted the presence of several Pike Township residents who attended the hearing in support of the remonstrance. She reiterated the history of these particular applications, through both LB hearings as well as the number of alcohol outlets surrounding the permit premises and pointed out that the area has a number of schools and a large number of families and children. She testified that she reviewed all of the petitions submitted for and against the permits in these matters and determined that with respect to PTRAs' petition in opposition, 97% of the signatories lived in Pike Township, while with the 56th and Georgetown location, only 33% of the individuals who signed the petition in favor of that permit lived in the township, and with respect to 71st and Woodlawn, only 26% who signed in favor of the application lived in Pike Township. Ms. Robertson also took issue with permittee's need for the permit to meet its competition, stating that the nearest gasoline station was approximately one mile away. On cross-examination, she admitted that the PTRAs are opposed to convenience stores/gas stations having alcohol permits anywhere in Pike Township.
2. Mary Walker, Marion County Alliance of Neighborhood Associations (MCANA). She felt that the decision of the ATC was correct the first time around when it denied the permit following the February 21, 2001 LB hearing. Ms. Walker contended that the Commission improperly remanded the matters back to the LB for a second hearing in violation of IC 7.1-3-19-11, by failing to make written findings.⁵⁹

⁵⁸ Although introducing no additional exhibits, Mr. McKean referred and reincorporated the exhibits previously introduced before both hearings of the LB.

⁵⁹ This HJ considers this point to be made on behalf of Ms. Walker individually, since it involves the practice of law. However, her standing as an individual remonstrator is questionable because she never intervened in her own behalf as required under 905 IAC 1-36-2, an issue this HJ does not address. However, her contention is wrong. Remands fall outside of IC 7.1-3-19-11(b) because a remand by itself does not mean that the Commission declines to follow the recommendation of the LB, but rather, that it

3. Paul Satterly, 17 year resident of Pike Township and member of PTRAs board. He opposes convenience store/gas stations selling alcohol as an easy outlet for young people to get alcohol. He believes alcohol should only be sold in package liquor stores and there is no reason to make it more convenient.
- D. The following exhibits were introduced before the ATC in favor of the remonstrators and against the permittee in this cause:
1. Copy of letter of February 19, 2001, from Pike Township Residents Association, Jeanette M. Robertson, President, indicating that the board of the association voted unanimously to oppose the issuance of the permits at issue in this case, along with separate plat maps of the sites in question, a smaller scale map of the general area surrounding the 71st and Woodlawn location, and photographs of the 71st and Woodlawn site.
 2. Copy of the transcript of the February 20, 2001 LB hearing.
 3. Copy of "Character of Business" test for a grocery store.⁶⁰
 4. Copy of remand notice from the Commission remanding the permits at issue along with a similar permit from Johnson County, back to each respective LB for further hearing, dated August 27, 2001, along with this HJ's May 13, 2003 Entry on Status of Remonstrators.⁶¹
 5. Copy of petition containing approximately 289 signatures of individuals opposed to the issuance of these permits; a letter of March 18, 2002 from Saddlebrook Homeowners Association (SHA) Board of Directors by James Adoba, board officer, stating that the SHA voted unanimously against the issuance of these permits; copy of a petition containing 33 signatures of individuals opposed to the issuance of these permits; and copy of a letter from Crooked Creek Community Council, Inc., dated June 27, 2001 to the Commission opposing the issuance of these permits.⁶²
 6. Petition comparison between the PTRAs petition submitted in opposition to the permit request and BP's petitions in support of each respective store, along with a copy of BP's petitions.
 7. Copies of the minutes of the May 6, 2002 ATC meeting, along with a letter from Kim Chew to Ms. Robertson dated May 10, 2002, stating that the permits had been approved and notifying of the appeal process.⁶³
 8. Copies of the minutes of the July 16, 2002 ATC meeting.⁶⁴

desires more information on one or more aspects of the matter. MCANA further misunderstands that the appeal in this matter is from the April 15, 2002 deadlock decision of the LB, which effectively comes to the Commission without a recommendation, instead of the 3 – 1 LB vote reached in 2001.

⁶⁰ This document, which purported to work the question down to a sales formula which still required subjective analysis, is no longer used by the Commission.

⁶¹ That entry followed a March 11, 2003 prehearing conference between the applicant and all then remonstrators. The entry determined that the IABR lacked standing to further participate in this appeal. *See*, fn. 16, *supra*.

⁶² The petition containing 289 signatures was previously introduced by the PTRAs at the April 15, 2002 LB hearing, however, the other documents in this portion of Ms. Robertson's exhibits are new.

⁶³ These minutes show that the 71st and Woodlawn application was approved by the Commission under the misapprehension of circumstances that the LB vote was 2-1 to approve.

9. Copy of August 21, 2002 letter from Jeanette M. Robertson to Executive Secretary and Hearing Judge Daniel M. Steiner, requesting permission for a belated appeal and intervention.
10. Copies of the minutes of the May 5, 2003 and May 20, 2003 ATC meetings.⁶⁵
11. Copy of photograph of outdoor advertising sign from BP “fast food fresh”, as well as copies of the Yellow Book USA, Inc. 2003, pages 489, 967.⁶⁶
12. Copy of newspaper article entitled “CDC frowns on alcohol marketing”, *The Indianapolis Star*, Friday, April 11, 2003, page A10, along with a copy of a document entitled “Point-of-Purchase Alcohol Marketing and Promotion by Store Type – United States, 2000 – 2001”, *MMWR Weekly*, April 11, 2003.⁶⁷
13. Copy of letter of September 16, 2003 from the Honorable Bill Soards, Councilman, District 1, Indianapolis-Marion County Council, to Mark C. Webb, Hearing Judge, Indiana Alcohol & Tobacco Commission objecting to the proposed permit, along with a February 3, 2003 resolution passed by the City County Council asking for a moratorium for any new issuance of grocery permits to gas station/convenience stores, as well as a copy of a letter dated January 21, 2003, from At-Large Councilor Karen Celestino Horesman to the members of the LB urging denial of a similar permit located at Interstate 65 and Lafayette Road in Indianapolis.⁶⁸
14. Four (4) letters from area residents against the issuance of the permits sought in this matter, along with a petition against the issuance of the permits containing the names of 21 individuals.
15. Copy of pages 8 and 9 of the LB handbook pertaining to denial/non-renewal of a permit.
16. Copy of videotape of February 21, 2001 LB hearing.
17. Copy of videotape of April 15, 2002 LB hearing.

⁶⁴ Here, the 56th and Georgetown was voted on for the first time with the acknowledgment of the correct 2-2 LB vote, and the 71st and Woodlawn was voted on for a second time with the understanding that the prior vote to approve was based on a misunderstanding of the LB vote. During the discussion on the application prior to revote, it was made clear that the vote was 2-2 and the permit was again granted.

⁶⁵ Ms. Robertson’s point was that at those meetings, the Commission adopted LB recommendations from several counties other than Marion, for grocery permit applications involving Casey’s Enterprises, some of which were granted and others denied. However, this exhibit is marginal in value given the different circumstances of each individual permit application as well as the differing demographics in those other counties.

⁶⁶ These exhibits show permittee listed as a gasoline/service station as opposed to a grocery store. This HJ has already addressed this argument. *See*, fn. 52, *supra*.

⁶⁷ The essence of the article is that large advertisements in stores may promote drinking by youths. However, a representative from BP testified that the company does not do alcohol advertising and the remonstrators did not contest that assertion. *Morbid and Mortality Weekly Report* is a publication of the U.S. government’s Center for Disease Control.

⁶⁸ The City County Council’s resolution has no legal force or effect upon the Commission.

IV.
FINDINGS OF FACT

1. The Permittee, American Oil Company, Inc., 6070 West 71st Street, Indianapolis, Indiana 46278 (Permittee) is the applicant for a type 116 Alcohol and Tobacco Commission (ATC) permit, #DL49-18879. (ATC File).
2. On April 15, 2002, the LB voted 2 – 2 with respect to this permit. (LB Hearing).
3. On July 16, 2002, the Commission voted 4 – 0 to issue this permit. (ATC File).
4. Said permit was first issued on August 22, 2002. (ATC File).
5. The permit premises is located on the northeast corner of the intersection of West 71st Street and Woodland Drive. (ATC File).
6. 71st Street and Woodland Drive is the first intersection east of the 71st Street exit off of Interstate 465 on the northwest side of Indianapolis. (ATC File).
7. The proposed permit premises is located at a commercial intersection. (LB Hearing; ATC Hearing).
8. Saddlebrook Neighborhood Association encompasses an area which appears to be bounded on the north by 71st Street, to the west by Corporate Drive⁶⁹, to the east by Zionsville Road, and to the south, a line running east to west approximately 1/5 of a mile north of 62nd Street.⁷⁰ (ATC File).
9. The northwest corner of Saddlebrook is diagonally across the street from the southeast corner of the permit premises. (ATC File).
10. At the intersection of 71st Street and Zionsville Road, approximately 3/10 of a mile east of the proposed permit premises, is a complex of the Metropolitan School District of Pike Township containing a high school, middle school and an elementary school. (LB Hearing; ATC File).
11. The format of the permit premises here is called BP Connect and is a new concept for BP Amoco being introduced in Indianapolis and in two other markets worldwide. (LB Hearing).
12. These stores are all identical in layout to each other and to the proposed permit premises at issue and employ around 25 persons each, with each store has approximately 51 linear feet of grocery items throughout the store. (LB Hearing).
13. The Commission has awarded Type 115 grocery permits to two (2) other BP Connect locations in the Greater Indianapolis metropolitan area⁷¹; and to six (6) other grocery/convenience stores operated under the BP logo.⁷² (ATC Records).

⁶⁹ Corporate Drive is the same street as Woodland Drive south of 71st Street

⁷⁰ Although the boundaries of the neighborhood are marked on the plat map provided in the exhibits, it is impossible to distinguish the actual southern street(s) of this neighborhood.

⁷¹ Those locations are American Oil Company, d/b/a BP Connect, 2068 East Hadley, Plainfield, Indiana 46168, Permit No. DL32-18883; and American Oil Company, d/b/a BP Connect, 2628 East Main Street, Plainfield, Indiana 46168, Permit No. DL32-18887.

⁷² Those locations are American Oil Company, d/b/a Amoco #52781, 16788 Clover Road, Noblesville, Indiana 46060, Permit No. DL29-18882; American Oil Company, d/b/a Amoco, 2132 U.S. Highway 31,

14. The proposed permit premises stocks and sells the following items: automotive items (motor oil, antifreeze, gas and engine treatments, fuses, etc.), toilet paper, Kleenex, pet food and supplies, household cleaners, laundry detergent, dishwasher detergent, trash bags, soups, breakfast cereals and bars, coffee and supplies, canned meats, vegetables and fruits, pasta and sauce, peanut butter, jelly, macaroni and cheese dinners, mash potatoes, sugar, flour, pancake mix and syrup, salad dressing and condiments, insect repellents, charcoal and lighter fluid, potato chips pretzels, snack cakes, crackers, candy and other snack foods, cookies, beef jerky, cold medicines, first aid ointments, aspirin, shampoo and hair care products, oral hygiene products, diapers, feminine hygiene products, batteries, pencils, playing cards, glue, envelopes, bread, donuts, ice cream, milk, cheese and other dairy products, juice, lunchmeats, soft drinks, and bottled water. (LB Hearing).
15. The items listed in the above finding of fact are items normally found in a grocery store. (ATC Hearing).
16. The percentage of sales attributable to grocery items for 2001 is greater than 5.4% but less than 38.62%. (ATC File).⁷³
17. Approximately 135 individuals signed a petition in support of the permit sought for 71st and Woodlawn in this matter, thus indicating that they desire to purchase permissible alcohol products at that location. (LB Hearing; ATC File).⁷⁴
18. Customers have been purchasing alcoholic beverages from the permit premises since the permit was awarded in August, 2002. (ATC Hearing).
19. BP trains its employees on the sale of alcoholic beverages to the public and takes seriously its obligations not to sell alcohol to persons less than 21 years of age. (ATC Hearing).
20. There have been no complaints from any members of the public since the store began selling alcoholic beverages. (ATC Hearing).
21. Permittee has no known record of violations for sales of alcohol to minors at any of its locations in Indiana. (ATC Records).

Greenwood, Indiana 46143, Permit No. DL41-18884; American Oil Company, d/b/a Amoco #99242, 1850 East 151st Street, Carmel, Indiana 46033, Permit No. DL29-18886; American Oil Company, d/b/a Amoco #2244, 8133 East U.S. Highway 36, Avon, Indiana 46123, Permit No. DL32-98316; American Oil Company, d/b/a Amoco #2231, 1051 North Green, Brownsburg, Indiana 46112, Permit No. DL32-98303; and American Oil Company, d/b/a Amoco #2235, 11019 Pendleton Pike, Lawrence, Indiana 46236, Permit No. DL49-95393.

⁷³ This HJ does not question that for 2001, that the percentage of gross sales for all items sold other than gasoline was 38.62%. However, the permittee characterized all of those items (other than gasoline) as grocery items before the LB. With respect to items such as automobile products and tobacco products, this HJ does not consider those items to be grocery items even though they are items commonly found in a grocery store. If that were the case, a store which sold (other than gasoline) nothing but snackfoods, tobacco and automobile products would be considered a grocery store, without the necessity of carrying those core items, such as non-taxable grocery items and household goods (laundry detergent, light bulbs, cleaning supplies, health and beauty items, etc.) See, fn. 41, *supra*.

⁷⁴ Although it is difficult to identify some of these people, this does constitute evidence of a desire to purchase alcoholic beverage products in this type of setting. Furthermore, no allegations were made that this petition did not contain *bona fide* signatures or that they were fabricated and this HJ assumes that those who signed did so in good faith.

22. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

V.
CONCLUSIONS OF LAW

1. The permittee, American Oil Company, Inc., 6070 West 71st Street, Indianapolis, Indiana 46278 (Permittee) is the applicant for a type 116 Alcohol and Tobacco Commission (ATC) permit, #DL49-18879. (ATC File).
2. Said permit was first issued on August 22, 2002. (ATC File).
3. There was a quorum for the April 15, 2003 LB hearing. IC 7.1-2-4-16.
4. The 2-2 vote of the LB with respect to the renewal application is not a majority of the LB and the permittee did not receive a majority vote of the LB. IC 7.1-2-4-16; IC 7.1-3-19-11.
5. The function of a LB is that of a recommending body, and the Commission itself is the ultimate decision maker. IC 7.1-3-19-11.
6. It is required to follow the recommendation of the LB only when a majority (3 or more) of the members of the LB vote to deny a permit and in all other instances may act with or without the approval of the LB. *Indiana Alcoholic Beverage Commission v. State ex.rel. Harmon*, (1978), Ind., 379 N.E.2d 140, 142, 146-147.
7. There was no recommendation from the LB in this matter because neither side received three (3) or more votes. *Id.*
8. The Commission, in its absolute authority, shall issue, suspend or revoke, except as otherwise provided in this title, a retailer's or dealer's permit of any type. IC 7.1-3-19-1.
9. After review of a matter, the Commission may grant or refuse an application for a permit as it deems the public interest will be served best. IC 7.1-3-19-10.
10. There is no other provision of the alcoholic beverage code that instructs the Commission on how to treat less-than-full majority votes of the LB.
11. The Commission has the power and duty to act on the vote in this case even though the LB did not approve permittee's application with 3 affirmative votes. *Harmon, supra*, 379 N.E.2d 140, 142, 146-147.
12. The prospective permittee is not disqualified from holding an Indiana Alcoholic & Tobacco Commission permit. IC 7.1-3-4-2, IC 7.1-3-5-2 and IC 7.1-3-15-2.
13. Where permittee carries and sells a large number of non-taxable grocery items as well as ordinary household products, and where the percentage of sales of those products is between 5.4% and 38.62%, such sales are substantial within the meaning of the "character of business" test. IC 7.1-3-1-19.
14. Permittee in this case meets the conditions of the "character of business" test for holding an Indiana grocery alcohol dealer permit. *Id.*
15. The prospective permittee is of good moral character and is of good repute in the community. 905 IAC 1-27-1.

16. That the proposed permit premises are not in a residential area. IC 7.1-3-19-13 or 905 IAC 1-18-1.
17. There exists on the ATC's quota for Indianapolis, Marion County, Indiana, an opening for a grocery permit. IC 7.1-3-22-4.
18. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.
19. The ATC may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. 905 IAC 1-27-4.⁷⁵
20. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).⁷⁶
21. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
22. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
23. Where permittee shows that its customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
24. When remonstrators cite to the evils of alcohol in opposing a permit, it goes to the impact of such services on the neighborhood or community. 905 IAC 1-27-4(d).
25. LBs should not deny a permit to an otherwise qualified permittee based solely on evidence submitted by a competing permittee. *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. App. 1990), *trans. denied*.
26. Reasonable competition between permittees which results in better products being delivered, better services being offered, diverse shopping environments and lower prices to consumers is good public policy, helps protect and promote economic welfare, and is not inconsistent with the Commission's purpose of, *inter alia*, regulating and limiting the manufacture, sale, possession and use of alcoholic beverages. IC 7.1-1-1.
27. The Commission may reverse the LB's action in denying renewal of said permit if it finds that the LB's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a

⁷⁵ That is not to say that an equal showing must be made with respect to each component. There may be instances where the need is greater than the desire; (e.g., where there are few outlets in the area) or where the desire is greater than the need; (e.g., an applicant who wishes to place an available permit in an otherwise competitive area).

⁷⁶ Where the choice for the product is slim or nil, that will usually show a need, which would shift the burden to remonstrators to show that there are alternatives, or that whether or not need exists, there is simply no desire for the product. *See, John Malone Enterprises, Inc., v. Schaeffer, et.al.*, (1996), Ind.App., 674 N.E.2d 599, where the Court of Appeals upheld the denial of a package liquor store permit in Shipshewana, LaGrange County, where the overwhelming majority of the population were of Amish or Mennonite faith, each which required abstention from alcohol, and because of the unique character of Shipshewana, there were no alcohol outlets anywhere in the community. Such a setting is clearly different from the facts in this case, given the commercial location, as well as other alcohol dealer permits located in the near vicinity.

constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. IC 7.1-3-19-11.⁷⁷

28. The Commission's initial determination to award a permit following a 2 –2 vote of a LB is not clearly erroneous as long as there is substantial evidence which supports it. IC 7.1-3-19-11.
29. Where the permittee showed that it sold or had available for sale a substantial amount of non-taxable grocery items along with household items normally found in a grocery store, and where the permittee showed a need or desire for services at that location, even though there were remonstrators, such evidence constitutes substantial evidence justifying the award of the permit. *Id.*
30. The Commission's initial action in granting the application of the permittee's permit was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the initial determination of the Commission to grant the application in this matter was based on substantial evidence and must be sustained. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the permittee and against the remonstrators. The appeal of the remonstrators, Pike Township Residents' Association and the Marion County Alliance of Neighborhood Associations of the granting of the Type 115 permit, No. DL49-18879 to the permittee, American Oil Company, Inc., 6070 West 71st Street, Indianapolis, Indiana 46278 is denied and the initial determination of the Alcohol & Tobacco Commission in this matter is sustained.

DATED: _____

MARK C. WEBB, Hearing Judge

⁷⁷ This is the applicable standard used when there is a recommendation of the LB. There was no recommendation in this case.